Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
	)	
A National Broadband Plan For Our Future	)	GN Docket No. 09-51

COMMENTS OF PC LANDING CORP.

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SUMMARY

In its Further Notice of Proposed Rulemaking on ways to reform the Universal Service Fund ("USF") contribution system, the Commission seeks comment, *inter alia,* on whether it should eliminate the exemption for international-only telecommunications providers (the "international-only exemption"). PC Landing Corp., the cable landing licensee for the Pacific Crossing fiber optic submarine cable system ("Pacific Crossing" or "PC-1"), opposes the proposed elimination of the international-only exemption. The international-only exemption is based on the Commission's interpretation of a clear, unambiguous statutory provision, and, eliminating the exemption would be beyond the Commission's statutory authority.

Beginning with the *First USF Report and Order*, the Commission has correctly interpreted Section 254(d) as limiting the Commission's authority to impose USF contribution obligations on providers of *interstate* telecommunications. For fifteen years, the Commission has consistently found that it lacks the authority to apply USF contribution obligations to providers of exclusively international services, and none of the justifications cited by the Commission in support of eliminating the international-only exemption changes the clear statutory limitations of Section 254(d).

The "industry trends" emphasized by the Commission have no relevance to operators of high-capacity international submarine cables like PC Landing Corp. and do not require a reinterpretation of Section 254(d) in any event. Moreover, the Commission's attempt to read the distinction between interstate and international service out of the USF provision ignores the unambiguous language of Section 254(d) and Congressional intent. Where Congress intended the Commission to exercise authority over both interstate and international communications it explicitly provides such authority within the statutory language.

Indeed, Congress expressly considered giving the Commission the authority to impose USF contribution requirements on international-only providers and declined to do so. In addition, the Commission's failure to articulate a rational connection between its reinterpretation of Section 254(d) and any Congressional authorization would make its proposed elimination of the international-only exemption arbitrary, capricious, and an abuse of discretion. Eliminating the international-only exemption would represent a sudden and unexplained departure from the Commission's prior interpretation of Section 254(d). Consequently, the Commission's proposed reinterpretation of Section 254(d) section should be rejected and the international-only exemption retained.

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PC Landing Corp. ("PCLC"), by its undersigned counsel, respectfully submits its comments in response to the Further Notice of Proposed Rulemaking in the above-captioned proceedings on ways to reform the Universal Service Fund ("USF") contribution system.[1] Among other things, the Commission seeks comment on whether it should eliminate the contribution exemption for international-only telecommunications providers (the "international-only exemption"). For the reasons set forth herein, the Commission has no basis to eliminate the international-only exemption, which was based on the Commission's interpretation of a clear, unambiguous statutory provision, and to do so now would be beyond the Commission's statutory authority.

I. BACKGROUND ON PCLC AND THE PACIFIC CROSSING CABLE SYSTEM

PCLC, together with a Japanese affiliate, owns, operates, and maintains the Pacific Crossing fiber optic submarine cable system ("Pacific Crossing" or "PC-1").[2] PC-1 is a major,

[1] *See Universal Service Contribution Methodology; A National Broadband Plan For Our Future*, WC Docket No. 6-122 and GN Docket No. 09-51, Further Notice of Proposed Rulemaking, FCC 12-46 (rel. Apr. 30, 2012) ("FNPRM").

[2] PCLC is a wholly-owned subsidiary of NTT America, Inc., the U.S. subsidiary of NTT Communications Corp., a leading Japanese telecommunications carrier. PCLC owns the portions of PC-1 in the United States and in international waters and its affiliate, PC-1J K.K., a wholly-owned direct subsidiary of NTT Communications, owns the portions of PC-1 in Japan.

high-capacity international telecommunications link between the United States and Japan, with U.S. landings in Washington State and California.[3] PCLC holds a cable landing license from the Commission issued in 1998 which authorizes it to land PC-1 in the United States and operate on a private carrier basis.[4]

PCLC is a "carrier's carrier" – a wholesale provider of large-scale circuit capacity to leading U.S. and Asia telecommunications carriers as well as to enterprise customers that operate their own networks for the provision of IP-based communications between the U.S., Japan, and Asia.[5] PCLC provides exclusively international circuit capacity between the United States and foreign points.

II. DISCUSSION

The FNPRM seeks comment on a number of proposals designed "to reform and modernize how [USF] contributions are assessed and recovered."[6] The reforms proposed in the FNPRM are intended to clarify "what services and service providers must contribute to USF in order to reduce uncertainty, minimize competitive distortions, and ensure the sustainability of the Fund."[7] Among other reforms, the FNPRM requests comment on whether the Commission

[3] PC-1 is a 13,076-route-mile fiber-optic system with activated capacity of 1800 gigabits per second ("Gbps") or 1.8 terabits per second ("Tbps"). PC-1 consists of four segments connecting each of its four cable landing stations: (1) Ajigaura, Japan, to Harbour Pointe (Mukilteo), Washington; (2) Shima, Japan, to Grover Beach, California; (3) Ajigaura, Japan, to Shima, Japan; and (4) Harbour Pointe (Mukilteo), Washington, to Grover Beach, California.

[4] *See* PC Landing Corp., Cable Landing License, File No. SCL-LIC-19980807-00010, 13 FCC Rcd. 23384 (1998). The system was designed and built from 1998 to 2000, and has been in operation since 2000.

[5] Among the company's offerings are long term Indefeasible Rights of Use (or "IRUs"), which grant a long-term interest in network circuit capacity, shorter term leases, and various types of IP-based point-to-point services used for high-speed data and Internet traffic.

[6] *See Wireline Competition Bureau Announces Deadlines for Comments on Universal Service Contribution Methodology Further Notice of Proposed Rulemaking*, WC Docket No. 06-122 and GN Docket No. 09-51, DA 12-905 (rel. June 7, 2012).

[7] FNPRM, at ¶ 5.

should eliminate the current international-only USF contribution exemption for providers whose revenues are exclusively international.[8]

A. In the *First USF Report and Order* and Subsequent Decisions, the Commission Correctly Interpreted an Unambiguous Statutory Provision as Requiring the International-Only Exemption.

Section 254(d) of the Communications Act of 1934, as amended,[9] added by the Telecommunications Act of 1996,[10] provides that "[e]very telecommunications carrier that provides *interstate* telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service . . . . Any other provider of *interstate* telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires."[11]

Under the USF contribution rules implementing Section 254(d), "carriers that only have international revenues, *but have no interstate revenues,* are not currently required to contribute to the Fund."[12] This is consistent with the unambiguous and plain meaning of Section 254(d). In the *First USF Report and Order*,[13] the Commission concluded in adopting the international-only exemption that, "entities that provide only international telecommunications services are not required to contribute to universal service support *because they are not 'telecommunications carriers that provide interstate telecommunications.'*"[14] As the Commission recognized, "by

[8] *Id.* at ¶¶ 193-202. *See* 47 U.S.C. § 254(d).

[9] 47 U.S.C. § 254(d).

[10] Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

[11] 47 U.S.C. § 254(d) (emphasis added).

[12] FNPRM, at ¶ 194 (emphasis added).

[13] *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd. 8776 (1997) ("*First USF Report and Order*").

[14] *Id.* at ¶ 981 (emphasis added).

definition, foreign or international telecommunications are not 'interstate' because they are not carried between states, territories, or possessions of the United States."[15] Moreover, the Commission found that "incidental interstate traffic" created during the transmission of international communications would not transform otherwise international traffic to interstate communications subject to USF.[16]

Even though international-only providers were not subject to direct contribution requirements, the Commission nonetheless determined to assess the international and interstate end user revenues of interstate carriers.[17] At the time, however, it was troubled by the potential competitive inequalities of assessing international revenues of interstate carriers, while excluding those of international-only providers, but concluded that its hands were tied.[18] Indeed, while it originally intended to impose USF contribution obligations on all providers of international communications, it correctly concluded that the plain language of Section 254(d) precluded it from assessing contributions on the revenues of purely international carriers.[19] On reconsideration, it reaffirmed the international-only exemption, reiterating that international-only providers "are not telecommunications carriers that provide interstate telecommunications services"[20] – the jurisdictional trigger under Section 254(d).

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[15] *Id.* at ¶ 779.

[16] *Id.*

[17] *Id.*

[18] *See id.* at ¶ 196 ("The Commission created the current international-revenues exemption even though the Commission recognized that it would result in some providers of international services being treated differently from other such providers and that international-only providers benefited from federal universal service policies.").

[19] *Id.* at ¶ 779 ("We would prefer a more competitively neutral outcome, all other things being equal, but the statute precludes us from assessing contributions on the revenues of purely international carriers providing service in the United States, even though we believe that they, too, benefit from our universal service policies.")

[20] *Federal-State Joint Board on Universal Service; Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, CC Docket No. 96-45; CC Docket Nos. 96-262, 94-1, 91-213, and 95-72, Fourth Order on Reconsideration in CC Docket No. 96-45, Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, 13 FCC Rcd. 5318, ¶ 347 (1997).

The Commission again reviewed the international-only exemption in its 1997 USF report to Congress, commonly referred to as the "*Stevens Report*."[21] There, the Commission again recognized that the express language of Section 254(d) "precludes it from assessing contributions on the revenues of purely international carriers providing service in the United States."[22] Recognizing that the international-only exemption could only be eliminated through amendment of Section 254(d), the Commission asked Congress for a "legislative change" that would allow it to include international-only carriers within the class of direct USF contributors.[23] Congress declined to act on the Commission's request and the applicability of Section 254(d) remains limited to interstate providers of telecommunications.

B. The Commission Lacks the Authority or any Rational Basis to Eliminate the International-Only Exemption, and Doing So Would Disregard the Plain Language of Section 254(d) and Numerous Other Provisions of the Communications Act.

Despite the clear limitations on its authority in Section 254(d) and nearly fifteen years of precedent, the Commission now seeks comment on eliminating the international-only exemption, asking whether "industry trends" and changes in market circumstances somehow justifies a different interpretation of Section 254(d)'s plain language.[24] For industry trends, the Commission highlights the recent growth in the prepaid calling card market, which predominately involves international calls, and suggests that a calling card provider that provides interstate service and contributes to USF may not be able to compete with international-only competitors that are not required to contribute to USF.[25] The Commission also noted the

[21] *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd. 11501 (1998) ("*Stevens Report*").

[22] *Id.* at ¶ 113.

[23] *Id.* at ¶¶ 133, 128.

[24] FNPRM, at ¶¶ 197-202.

[25] *Id.* at ¶ 197.

increase in the amount of revenue not subject to assessment due to the international-only exemption.[26]

Not only do these facts have no relevance to a key sector of the market – operators of high-capacity international submarine cables such as PCLC that provide IP circuit capacity to carriers and large enterprises – they are completely irrelevant to an interpretation of the language of Section 254(d), or provide a basis for how that language may be "better viewed."[27] Nothing has changed with respect to this statutory language, and as noted, the Commission in 1996 was as concerned with the international-only exemption and the marketplace then, including potential competitive inequalities, as it is now. The mere fact that some international communications service markets are experiencing revenue growth does not somehow create a statutory hook to make *all* international communications services subject to USF in the face of statutory language that could hardly be clearer.

Moreover, the imposition of contribution obligations on international revenues of international-only carriers would put U.S.-based international providers at a distinct competitive disadvantage compared with their foreign competitors.[28] Moreover, the industry has relied on the international-only exemption for the last fifteen years, and eliminating that exemption now would adversely affect existing business plans and strategies. Ironically, by eliminating the international-only exemption, the Commission would impose new market distortions at the same time it attempts to level the playing field for international communications service providers in the United States.

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[26] *Id*. at ¶ 198.

[27] *Id.* at ¶ 200.

[28] *See 1998 Biennial Regulatory Review - Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, CC Docket No. 98-171, Comments of USF Coalition, at 9 (filed Oct. 30. 1998).

The Commission also offers a reinterpretation of Section 254(d) in support of the elimination of the international-only exemption that attempts to read the distinction between interstate and international service out of the statute.[29] As the Commission stated in the FNPRM, "[i]n 1997, the Commission interpreted section 254 of the Act . . . as drawing a three-way distinction between intrastate, interstate, and international telecommunications."[30] The Commission's new interpretation of Section 254(d) would create a two-way distinction "between the authority of the states (which have authority over providers of intrastate telecommunications under section 254(f)) and the authority of the Commission (which has authority over providers of interstate telecommunications under section 254(d))."[31] Under this interpretation, the Commission would propose to impose USF contribution obligations on international-only providers as part of its authority over interstate communications.

After nearly fifteen years of operating under the international-only exemption, the Commission may not "depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."[32] When Congress leaves a statutory gap for an agency to fill, "there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."[33] By contrast, when Congress has "directly spoken to the precise question at issue," agencies must "give effect to the unambiguously expressed intent of Congress."[34] The case for

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[29] FNPRM, at ¶ 200.

[30] *Id.* (citing *First USF Report and Order*, at ¶ 779).

[31] *Id.*

[32] *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009).

[33] *United States v. Mead*, 533 U.S. 218, 227 (2001).

[34] *See Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc*., 467 U.S. 837, 842-43 (1984). *See also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 982 (2005); *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 704 (D.C. Cir. 2011).

deference to an agency's reinterpretation "is less compelling with respect to agency positions that are inconsistent with previously held views."[35]

No statutory gap exists in Section 254(d). As the Commission itself has repeatedly found, the statute unambiguously states that "[e]very telecommunications carrier that provides *interstate* telecommunications services shall contribute . . . to the specific, predictable, and sufficient mechanisms established by the Commission . . . ."[36] Nowhere in Section 254(d) or the 1996 Act which added the provision does Congress suggest that the Commission may impose USF contribution obligations on international-only providers.

Lest there be any doubt, a review of the legislative history underpinning Section 254(d) demonstrates that the Commission's reinterpretation conflicts not only with the express language of the section, but with clearly expressed Congressional intent. As originally proposed in the Senate, the bill that gave rise to the 1996 Act, S. 652, the Telecommunications Competition and Deregulation Act of 1995, would have imposed USF contribution obligations on "*[e]very* telecommunications carrier engaged in *intrastate, interstate, or foreign communications*."[37] The report accompanying S. 652, stated that this provision "requires *all* telecommunications carriers . . . to contribute on an equitable and nondiscriminatory basis to the preservation and advancement of universal service."[38] Thus, the Senate version would have explicitly done what the Commission wants to do here, and what it would have done in 1996 had it not correctly concluded that it was trumped by the plain meaning of the statute; the Senate version would have extended contribution requirements to international-only (as well as intrastate) providers.

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[35] *Pauley v. BethEnergy Mines*, 501 U.S. 680, 698 (1991).

[36] 47 U.S.C. § 254(d) (emphasis added).

[37] S. Rep. No. 104-23, at 94 (1995) (proposed 47 U.S.C. § 253(c)) (emphasis added).

[38] S. Rep. No. 104-23, at 27-28 (emphasis added).

However, in Conference Committee, the references to "intrastate" and "foreign communications" that were in the Senate version of what ultimately became Section 254(d), were stricken from the final version of the bill as enacted in the 1996 Act. Specifically, as noted in the Conference Report, in contrast to the Senate bill, "[n]ew section 254(d) requires that all telecommunications carriers *providing interstate telecommunications services* shall contribute to the preservation and advancement of universal service."[39] Consequently, Congress expressly considered giving the Commission the authority to impose USF contribution requirements on international-only (as well as intrastate) providers, but declined to do so.

The Commission's suggestion that the use of "interstate" in Section 254(d) may be better viewed as drawing a distinction between "interstate" and "intrastate" and therefore subsumes "international" within "interstate" not only flies in the teeth of the legislative history of the section discussed above, but seeks to create an ambiguity when the language of the statute could not be clearer. Indeed, such an interpretation is absolutely inconsistent with numerous provisions throughout the Communications Act, which make absolutely clear that when Congress intended the Commission to exercise authority over both interstate *and* international communications it did so explicitly and expressly within the statutory language.[40] Finally, as the

[39] H.R. Rep. No. 104-458, at 143 (1996) (Conf. Rep.) (emphasis added).

[40] *See*, e.g., 47 U.S.C. § 152 ("The provisions of this chapter shall apply to *all interstate and foreign communication* by wire or radio and all interstate and foreign transmission of energy by radio . . . .") (emphasis added); § 201 ("It shall be the duty of every common carrier *engaged in interstate or foreign communication* by wire or radio to furnish such communication service upon reasonable request therefor . . . .") (emphasis added); § 223 ("Whoever *in interstate or foreign communications* by means of a telecommunications device [k]nowingly (i) makes, creates, or solicits, and (ii) initiates the transmission of, any comment . . . or other communication which is obscene or child pornography . . . shall be fined under title 18 or imprisoned not more than two years, or both.") (emphasis added); § 229 ("The Commission may, consistent with maintaining just and reasonable charges, practices, classifications, and regulations in connection with the provision *of interstate or foreign communication* by wire or radio by a common carrier, allow carriers to adjust such charges, practices, classifications, and regulations in order to carry out the purposes of this chapter.") (emphasis added); § 605 ("[N]o person receiving, assisting in receiving, transmitting, or assisting in transmitting, *any interstate or foreign communication* by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception.") (emphasis added).

Commission acknowledge in the FNPRM, the Communications Act distinguishes "foreign communications" from both interstate and intrastate communications.[41] The Commission asks whether this statutory distinction between foreign, interstate, and intrastate communications affects its authority to treat interstate and foreign telecommunications identically for USF purposes.[42] The answer is certainly "yes." In contrast to the FNPRM's suggestion, Congress, as noted, does not use the terms interstate and international interchangeably and Section 254(d) cannot be read to subsume international communications within interstate communications.

C. Elimination of the International-Only Exemption Would Be Arbitrary, Capricious, and an Abuse of Discretion.

At bottom, the Commission's proposed reinterpretation of Section 254(d) should also be rejected as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[43] While an agency may change its mind regarding the interpretation of a statute, an unexplained inconsistency with past procedure may represent "an arbitrary and capricious change from agency practice under the Administrative Procedure Act."[44] In addition, a "sudden and unexplained change, . . . or change that does not take account of legitimate reliance on prior interpretation, . . . may be 'arbitrary, capricious [or] an abuse of discretion.'"[45] At all times, the Commission must establish a "rational connection between the facts found and the choice made."[46]

Here, the Commission has failed to make a rational connection in the FNPRM between its new interpretation of Section 254(d) and any Congressional action authorizing the imposition

[41] FNPRM, at ¶ 200 (citing 47 U.S.C. §§ 151-153).

[42] *Id*.

[43] 5 U.S.C. § 706.

[44] *Nat'l Cable & Telecomms. Ass'n* , 545 U.S. at 981.

[45] *Smiley v. Citibank (S.D.), N.A*., 517 U.S. 735, 742 (1996).

[46] *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009).

of USF contribution obligations on international-only providers. The Commission's proposed elimination of the international-only exemption would represent a sudden and unexplained departure from its prior interpretation of Section 254(d). International communications providers have legitimately relied on the international-only exception for nearly fifteen years. Without the exemption, these providers would need to substantially revise their business models and settled business practices to account for newly-imposed USF contribution and reporting obligations. In sum, the Commission's proposed elimination of the international-only exemption should be rejected, and the Commission should leave undisturbed its statutory interpretation that its authority to impose USF contribution obligations is confined to providers of interstate telecommunications.

III. CONCLUSION

PCLC respectfully opposes the proposed elimination of the international-only exemption. The Commission lacks the statutory authority to impose USF contribution obligations on international-only providers and has no basis to depart from its settled interpretation of an unambiguous statutory provision, and to do so now, after more than fifteen years, would be arbitrary, capricious, and an abuse of discretion.

Respectfully submitted,

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